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IN THE

Supreme Court of the United States

No. 75-973

UNITED TRANSPORTATION UNION LODGE NO. 550, *et al.*,

Petitioners,

v.

ROBERT ROCK, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Supplemental Statement of the Case[1]

The two railroad yards involved here are almost completely segregated by race. As the Court of Appeals noted, in July 1965 only 3 of 176 Barney Yard employees were white and only 3 of 302 CT Yard employees were black (A.44). This pattern of racial segregation did not significantly lessen in the years after 1965. At no time prior to trial was the Barney Yard less than 92% black and at no time was the CT Yard less than 96% white (A.I. 30-31). To be sure, this racial segregation was initially the product of a familiar segregated hiring system

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[1] While Petitioners' Statement of the Case is not seriously inaccurate, it omits crucial facts here summarized.

which was instituted before 1965 but continued to function until enjoined by the district court in 1972 (A.44-48, A.86).[2] However, once established, defendants N & W and the Unions assured the continuation of the racially segregated pattern of assignments by means of a familiar "lock-in" seniority system. The Barney Yard formed one seniority unit and the CT Yard a separate unit (A.44). A worker could transfer from one unit to another only at the price of forfeiting all of his accumulated seniority in the original unit and starting over as a new man in the other unit (*id.*, A.I. 29). The inevitable and foreseeable effect of this system was that virtually no workers transferred between the two segregated yards. To do so, as Judge Winter aptly wrote, would have been to commit "seniority suicide" (A.88).

Work opportunities in the two yards were not only separate but also unequal. The Court of Appeals concisely summarized the massive and uncontradicated evidence of disparities in work opportunities: "The record reflects that there was significantly less opportunity for work and for promotion, and significantly greater possibility of layoff at Barney than that at the CT Yard" (A.88).[3] As a result of the CT Yard offering more work, more promoted positions, more rapid advancement, and more security from layoff, CT Yard workers consistently out-earned their Barney Yard counterparts (A.90). Extensive and detailed income analysis shows that CT Yard men, on the average,

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[2] Post-1965 hiring was as clearly discriminatory as pre-1965 hiring had been. After Title VII became effective but before trial, N & W hired 100 whites but only 15 blacks into the CT Yard, while hiring 27 blacks but only 7 whites into the Barney Yard (A.I. 31).

[3] N & W conceded these disparities both with respect to furloughs and layoffs (A.I. 775, A.I. 776).

earned 17%—nearly $1200 per man per year—more than Barney men of equivalent seniority (see A.II. 342-364, 249-251, and esp. Pl. Ex. R-14 at A.II. 402).

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Award of Back Pay Is Consistent With and Mandated by This Court's Decision in *Albemarle Paper Co.* v. *Moody.*

This Court last term decided all the legal issues presented by the back pay question in the case at bar. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). In an attempt to avoid the inevitable conclusion that the case raises no issues warranting a grant of certiorari, Petitioners quibble about the correctness of various findings of fact purportedly made or not made by one or the other court below. Manifestly, these are not the types of questions which justify exercise of this Court's certiorari jurisdiction.

(1) Petitioners argue that back pay should not have been awarded because the only discrimination that caused income loss was hiring discrimination (Pet. 21-23). But the rule in *Albemarle* does not limit back pay to cases of seniority or job-classification discrimination; on the contrary, *Albemarle* broadly mandates back pay in any case "given a finding of unlawful discrimination," 422 U.S. at 421. And in any event, it would be hard to imagine a clearer example of discriminatory seniority and job-classification systems than those maintained by these defendants. The illegality of these systems is what required injunctive relief in the nature of dovetailing in the first place.

(2) Petitioners next argue that no back pay should be awarded because of N & W's purported offer to merge ros-

ters in 1968 (Pet. 24-26).[4] Whether or not any such offer was made in good faith, and, if so, whether Respondents knew about it, are disputed facts hotly contested below. Under *Albemarle*, the factual issue is of no consequence at this stage of proceedings:

> If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries . . . . Title VII is not concerned with the employer's "good intent or absence of discriminatory intent" for Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. *Griggs* v. *Duke Power Co.* [401 U.S. 424, 432]. 422 U.S. at 422-23.

Even if the offer did matter, the record compelled the Court of Appeals to conclude, as it correctly held, that the district court's finding was without basis and, therefore, clearly erroneous (A.89, and see A.93-94 n.1a).

(3) Petitioners next seek an advisory ruling on whether they can be held liable for a portion of any back pay award that Respondents may eventually recover (Pet. 28-31). Neither court below has yet ruled on the issue of the Unions' liability. As the Fourth Circuit observed, in rejecting the Petitioners' same argument below,

> It may well be that the unions should bear part of any back pay award . . . .
>
> * * * * *
>
> But, the question of whether the unions should bear part of the award for back pay is not ripe for adjudi-

[4] It is uncontradicted in the record that Petitioners were adamantly opposed to any form of merger in 1968 and thereafter, and told Respondents so.

> cation. It has not yet been decided by the district court . . . . We defer to it [the district court] for initial decision of this issue.

A.92, A.94. Moreover, the Fourth Circuit's ultimate comment in this regard (it reached no judgment) could hardly be more reasonable or less dispositive.[5]

(4) For its final medley of points regarding back pay, Petitioners urge that this Court should grant certiorari to declare that the Court of Appeals was bound by the district court's findings of fact (Pet. 31-33). In effect, Petitioners urge this Court to renounce the central ruling of *Albemarle*:

> [B]ackpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.[14] *The courts of appeals must maintain a consistent and principled application of the backpay provision*, consonant with the twin statutory objectives . . . .
>
> [14] It is necessary, therefore, that if a district court does decline to award backpay it carefully articulate its reasons.

405 U.S. at 421 (emphasis added). The Court of Appeals explicitly recognized and followed this mandate (A.86, A.92). It understood as this Court intended, that while district courts' reasons for denying back pay are to be given appropriate consideration, they are subject to critical scrutiny to assure their fidelity to the principles of *Albemarle*.

[5] "We state only that the decision of whether either or both of the unions is to share in N & W's liability for back pay depends upon whether they combined with N & W to deprive black employees of income opportunities" (A.95).

There is no occasion for this Court to review the Court of Appeals' discharge of its proper function in deciding the back pay issue under *Albemarle*.

II.

The Court of Appeals' Grant of Dovetailing Is a Proper Remedy.

After its first order of "top and bottom" relief and the Fourth Circuit's reversal of that order,[6] the district court on remand resolved the principal remaining issue of injunctive relief by granting a modified "top and bottom" merger of conductors' seniority rosters (A.71-72). For reasons clearly explained in the Fourth Circuit's second opinion, this merger would not have eliminated the effects of past discrimination and indeed would have preserved them indefinitely (see A.97-99). The Court of Appeals thus quite properly ordered the adoption of a true "dovetailing" plan which utilize the *only* seniority date not itself a product of defendants' past discrimination—"Terminal seniority," or initial date of hire (A.97, A.99-100). This result is consistent with and mandated by the broad remedial purpose of Title VII, as recognized by this Court in *Albemarle*, 422 U.S. at 417-18.[7] Petitioners' argument, in essence, is that the Court of Appeals abused its discretion by requiring more than partial relief.

(1) First Petitioners reiterate their familiar refrain, accusing the court below of awarding "super-seniority" (Pet.

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[6] See A.48-52.

[7] That purpose requires that the remedy provide "the most complete relief possible," *id.*

35, 38).[8] This label is meaningless here, since the only seniority usage extended to black workers by the dovetailing is based on their actual hire date seniority, and white workers are allowed to use the same measure of seniority when competing with blacks (A.96-97).

(2) Next Petitioners charge that the dovetailing would cause displacement of incumbent workers (Pet. 36-38). This assertion is at best careless and clearly wrong, since Respondents' proposed dovetailing explicitly provided that no incumbent should be displaced by operation of the decree, as the Fourth Circuit noted (A.97 n.2).

(3) Petitioners concede that the Fourth Circuit's initial mandate was to "eliminate all residual effects of past discrimination to the greatest extent practical" (Pet. 35). However, they do not urge the only reason that could justify less-than-complete relief in light of that correct mandate: the reason of business necessity. This fatal omission is easily explained. The N & W, which has the greatest interest in the efficient operation of the railroad, has repeatedly stated that Respondents' proposal is workable (A.96, A.99).

(4) Stripped of its loose verbiage (see Pet. 38-39), the Petition essentially argues that the Fourth Circuit erred in following the well-established doctrine of "rightful place" seniority relief. It is much too late in the day for the Courts of Appeals to renounce this settled doctrine, which this Court has repeatedly refused to review. *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).[9]

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[8] Petitioners' previous unsuccessful petition for certiorari, which was denied in 1973, 412 U.S. 993, invoked the same rhetoric.

[9] See also, for example, *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *United States* v. *Chesapeake & Ohio Rwy. Co.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973).

Petitioners' arguments on their second question presented, therefore, raise no novel, unsettled, or important issues.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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